Supreme Court, U. S.
FILED
APR 16 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1356

MACOMB CONCRETE CORPORATION,
a Michigan corporation,
Petitioner,

-vs-

EARL DUBEY & SONS, INC.,
a Michigan corporation and
SENTRY INSURANCE COMPANY,
a foreign corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENTS IN OPPOSITION

TOLLEY, FISHER & VERWYS
By: Peter R. Tolley
Counsel for Respondents
IBM Building
2900 Charlevoix Dr., S.E.
Grand Rapids, Michigan 49506
Telephone: (616) 942-8090

IDEMA & PAWLOWSKI, of Counsel
By: George E. Pawlowski
Counsel for Respondents
532 Trust Building
Grand Rapids, Michigan 49503
Telephone: (616) 458-1075

AMERICAN PRINTING COMPANY, 125 WEALTHY STREET, S.E.,
GRAND RAPIDS, MICHIGAN 49503 — PHONE (616) GL 8-5326

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OPINIONS BELOW

The opinions complained of are correctly stated in the Petition for Certiorari and appended in the Petition's Appendix.

JURISDICTION

Petitioner's claim of jurisdiction is based solely upon a reference to 28 U.S.C. §1257 (1970). No reference is made in the Petition to Rule 19 pertaining to the considerations governing review on certiorari. Nor does the Petition claim or state that a substantial federal question is involved, or that the decisions below conflict with the decisions of this court. Respondents submit that the Petition fails on its face for not having stated adequate jurisdictional grounds.

QUESTION PRESENTED

WHETHER A PARTY WHO CONCEDES THAT IT HAS NOT PERFORMED A CONTRACT FOR THE CLAIMED REASON THAT THE CONTRACT DID NOT EXIST, CAN NOW CLAIM THAT IT VIOLATED DUE PROCESS FOR A JURY TO HAVE FOUND FACTUALLY THAT THE CONTRACT DID EXIST AND THAT PETITIONER BREACHED IT.

STATEMENT OF THE CASE

A correct description of the facts in this case is set out in great detail in the Michigan Court of Appeals' decision (Petitioner's Appendix, page 33).

Without belaboring what was an enormously complicated factual dispute, Respondents only wish to highlight those facts which will put Petitioner's Statement of the Case in a proper light.

First, contrary to Petitioner's statement, advances were in fact made by Petitioner under the July 17th contract. (Michigan Court of Appeals' decision, Petitioner's Appendix, page 40.)

Second, although it was factually disputed as to whether Macomb or Westinghouse first repossessed the Dubey plant, this turned out to be irrelevant since Macomb at trial by its chief executive officer, James Hicks, conceded that only a day or two after the July 17th agreements were signed, that Macomb decided not to perform; ie., not to extend time for performance (Appendix, page 8). This preceded the repossession by whomever made.

Third, as evidenced from the Michigan Court of Appeals' decision, Macomb's strategy at trial was not to focus on the performance aspect of the July 17th contracts, but rather was to concede nonperformance based upon the assertion that the contracts did not exist for want of consideration, mutuality, et cetera. That this was the basis upon which the case was to be tried by Petitioner was clearly stated by Petitioner in its opening statement to the jury:

> "Now, Count three is that very interesting charge in which the plaintiff says that after we amended the contract—we wrote the contract, haggled over it for weeks and everybody signed it, and then we amended it in writing on May 31st, and then we amended it again in writing on June 1st—that on July 17th, the contract which the parties would not sign and which was not recognized as signed, is a contract and that we should be responsible for paying off his damages because he contends that we promised on that day and that we are bound by our contract promises.
>
> Now, we will show that, in fact, no new contract does exist; that there was certainly no consideration for Macomb to go beyond this point; that the only thing that could have come from another contract to Macomb would have been that which they already had a contract for." (Appendix, page 10 & 11)

This choice of strategy on the part of Macomb does not eliminate the fact that it was on notice that Dubey was claiming a breach of those contracts, as is amply demonstrated by the pre-trial statement filed with the trial court prior to commencement of trial:

> "(e) Did the defendant, Macomb Concrete Corporation, breach any substantial or material provisions of its contract with Earl Dubey & Sons, Inc.?" (Appendix, page 13)

The cause was tried before a jury for four and a half weeks. No pertinent jury instructions were objected to. Subsequent to the verdict Petitioner has had the following post-judgment hearings to review that verdict:

1. Motions for new trial and/or judgment notwithstanding the verdict, denied by trial court September 13, 1976.
2. Appeal in Michigan Court of Appeals, dismissed on motion for lack of timely filing December 17, 1976.
3. Application for leave to appeal granted by the Michigan Court of Appeals June 1, 1977.
4. Decision of the Michigan Court of Appeals affirming the jury verdict and denials of motions for judgment notwithstanding the verdict and new trial, 81 Mich App 662, 266 N.W.2d 152 (1978).
5. Application for rehearing in the Michigan Court of Appeals, denied April 18, 1978.
6. Application for leave to appeal to the Michigan Supreme Court, denied July 5, 1978.
7. Motion for reconsideration in the Michigan Supreme Court, denied December 7, 1978.

ARGUMENT

As related above, Petitioner has not even attempted to comply with Rule 19 relative to establishing that this matter involves a substantial federal question or conflicts with some decisions of this court. Moreover, Petitioner has had innumerable reviews of the jury verdict in the courts below:

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this court merely to give the defeated party . . . another hearing". *Magnum Co.* v *Coty*, 262 U.S. 159, 163; 43 Sup.Ct. 531; 67 L Ed 922 (1923).

What is involved is an enormously complicated factual dispute concerning the construction of a local contract under Michigan law. Such matters are best left to the business of the state courts, and are not reviewable on certiorari. See *U.S.* v *Johnston*, 268 U.S. 220, 45 Sup.Ct. 496 (1924), 69 L Ed 925; *Black* v *Cutler Laboratories*, 351 U.S. 292, 76 Sup. Ct. 824, 100 L Ed 188, rehearing denied, 352 U.S. 859, 77 Sup.Ct. 21, 1 L Ed 2d, 69 (1956).

More importantly, the decisions of both the Michigan Court of Appeals and Supreme Court were correct. At each juncture of these protracted proceedings Petitioner raises new issues in the hopes of obtaining another hearing. As related above, Petitioner had intentionally, for tactical reasons, focused the trial proceedings on the "duty" aspect of the July 17th contracts and not the "breach" aspects. This was its choice and not respondents'. As a matter of Michigan law, where a party eliminates an issue through concession, it may not be raised on appeal for the first time, particularly when the appellate position is predicated on an entirely different theory from that advanced below. See *Ass'n of Hebrew Teachers* v *Jewish Welfare Federation*, 62 Michigan Appeals 54, 223 N.W. 2d 184 (1975); *Ford* v *Howard*, 59 Michigan Appeals 548, 229 N.W.2d 845 (1975). Such matters of state pleading and practice are not reviewable on certiorari. See *Central Vermont R. Co.* v *White*, 238 U.S. 507, 35 Sup. Ct. 865, 59 L Ed 1433 (1915).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TOLLEY, FISHER & VERWYS
Counsel for Respondents

By: Peter R. Tolley
Business Address:
370 IBM Building
2900 Charlevoix Drive, S.E.
Grand Rapids, Michigan 49506
Telephone: (616) 942-8090

IDEMA & PAWLOWSKI
Of Counsel for Respondents

By: George E. Pawlowski
Business Address:
532 Trust Building
Grand Rapids, Michigan 49503
Telephone: (616) 458-1075

Dated:

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Excerpt of Proceedings

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

EARL DUBEY & SONS, INC.,
a Michigan Corporation, and
SENTRY INSURANCE,
a Mutual Company,
Plaintiffs and Counter-Defendants.

-VS-

No. 74-7552-CK
VOLUME XIII

MACOMB CONCRETE CORPORATION,
a Michigan Corporation,
Defendant and Counter-Plaintiff.

EXCERPT OF PROCEEDINGS had before the HONORABLE ROBERT J. CHRZANOWSKI, (P-11875), Judge of the Sixteenth Judicial Circuit, at Mount Clemens, Michigan, on Friday, March 26, 1976.

APPEARANCES:

FREIHOFER, HECHT, OOSTERHOUSE & DE BOER, P.C.
950 Union Bank Building
Grand Rapids, Michigan 49502

By: Mr. Peter R. Tolley, (P-21492)
Appearing on behalf of the Plaintiffs and Counter-Defendants.

DANK, KASER & SMITH
44 First Street
Mount Clemens, Michigan 48043

By: Mr. Robert P. Dank (P-12487)
Appearing on behalf of the Defendant and Counter-Plaintiff.

Q. And yet, I believe in your testimony yesterday, the question Mr. Dank asked was when was the decision made about not going forward with the documents of July 17th, do you recall that question or a question like that?

A. I believe, yes.

Q. Was your answer within a day or two after that?

A. Well, on the 17th, I don't have a specific recall of the 17th. I wasn't there, but I was in contact by phone. I didn't consider that—there was four parties involved in this agreement, and in the past—

Q. (Interposing) Excuse me, Mr. Hicks. I know what you'd like to tell me, about Cle-Tex not signing, right?

A. Well, they didn't.

Q. I agree, they didn't.

A. Nor did the surety.

Q. But I'd like to ask the questions with respect to very specific things, and I think my question was did you not say yesterday that the decision not to go forward with the documents of the 17th was made a couple of days, within a couple of days thereafter; was that your testimony yesterday, to the best of your recollection?

A. To the best of my recollection, yes.

Q. So, approximately the 19th or thereabouts, give or take a day, you made a decision, you, James Hicks, made a decision not to go forward with the agreements of the 17th of July for whatever reasons; correct?

A. I made—we made—I made a basic decision not to go forward with Mr. Dubey.

Q. Right.

A. Yes.

Q. And that decision was essentially based upon your opinion as a construction engineer and consultant of many years that he couldn't do the job; correct?

A. That's right.

Q. And it wasn't because Cle-Tex hadn't yet signed the lease principally, but rather your opinion of his ability to do the job; correct?

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF MACOMB

EARL DUBEY & SONS, INC.,
a Michigan Corporation, and
SENTRY INSURANCE,
a Mutual Company,
Plaintiffs and
Counter-Defendants.

-vs-

MACOMB CONCRETE CORPORATION,
a Michigan Corporation,
Defendant and
Counter-Plaintiff.

No. 74-7552-CK
VOLUME I

PROCEEDINGS had before the HONORABLE ROBERT J. CHRZANOWSKI, (P-11875), Judge of the Sixteenth Judicial Circuit, at Mount Clemens, Michigan, Wednesday, March 3, 1976.

APPEARANCES:

FREIHOFER, HECHT, OOSTERHOUSE & DE BOER, P.C.
950 Union Bank Building
Grand Rapids, Michigan 49502

By: Mr. Peter R. Tolley, (P-21492) and
Mr. George E. Pawlowski, (P-18728)
Appearing on behalf of the Plaintiffs and Counter-Defendants

DANK, KASER & SMITH
44 First Street
Mount Clemens, Michigan 48043

By: Mr. Robert P. Dank, (P-12487)
Appearing on behalf of the Defendant and Counter-Plaintiff.

that Macomb Contracting Corporation knew that the pit was deficient and that we concealed that information and that that information was material and that we knew that it was material, and that they relied upon our making a full disclosure of all the information that we knew. They relied on it to their own detriment, and they were, therefore, damaged or injured in some way. Now, our contention, as I have already told you, is that the facts will show we certainly didn't behave like a person trying to defraud somebody. He went down there with all of his people, examined the site and examined all the other information that was available, and we will show you with what I think is very convincing evidence that, in fact, all of the reports we had he had. He just failed to use them wisely.

Count two says that we represented this site was suitable to him, even though we knew the site was geologically impossible to mine. It says that the fact that the site was impossible to mine was something which should excuse him from the contract. So, he says because the contract was impossible in the beginning, there could not have been any meeting of the minds between the parties and, therefore, in the eyes of the law, we should be excused from the contract. We should have damages.

Now, Count three is that very interesting charge in which the plaintiff says that after we amended the contract—we wrote the contract, haggled over it for weeks and everybody signed it, and then we amended it in writing on May 31st, and then we amended it again in writing on June 1st—that on July 17th, the contract which the parties would not sign and which was not recognized as signed, is a contract and that we should be responsible for paying off his damages because he contends that we promised on that day and that we are bound by our contract promises.

Now, we will show that, in fact, no new contract does exist; that there was certainly no consideration for Macomb to go beyond this point; that the only thing that could have

come from another contract to Macomb would have been that which they already had a contract for.

Count four counsel has told you he doesn't intend to prove, but he charges that Macomb conspired against the plaintiff and the plaintiff's surety by falsely representing to the plaintiff that the site was suitable. Whether he has any evidence on it or not, we intend to show you that there was, in fact, a conspiracy.

Count five says that there was a mistake and the mistake is this: that everybody, Macomb and Dubey, assumed that he could go down there and for this penal sum of the bonds issued by it, to wit: $543,000?

The factual issues for the jury include:

(a) Was there a unilateral or mutual mistake made by either or both of the parties, Earl Dubey & Sons, Inc., and Macomb Concrete Corporation, regarding the availability, at the Cle-Tex site, of raw materials necessary to produce the requirements of the contract between the parties.

(b) Did the Defendant, Macomb Concrete Corporation, fail to provide material facts to the Plaintiff, Earl Dubey & Sons, Inc., as to the condition and suitability of the site which Defendant had leased upon which Plaintiff was expected to mine and process sand and gravel.

(c) Was it impossible for the Plaintiff, Earl Dubey & Sons, Inc., to reasonably and economically produce the materials required of it under its contract?

(d) Did the Defendant, Macomb Concrete Corporation, misrepresent or knowingly fail to disclose material facts to the Plaintiff, Earl Dubey & Sons, Inc., relative to the suitability of the site upon which it had obtained a lease and upon which the Plaintiff was expected to mine and process sand and gravel.

(e) Did the Defendant, Macomb Concrete Corporation, breach any substantial or material provisions of its contract with Earl Dubey & Sons, Inc.?

(f) What are the damages incurred by the Plaintiff, Earl Dubey & Sons, Inc.?

(g) What are the damages incurred by the Defendant, Macomb Concrete Corporation?

(h) May the Plaintiff, Earl Dubey & Sons, Inc. recover damages from the Defendant, Macomb Concrete Corporation?

(i) May the Defendant, Macomb Concrete Corporation, recover damages from the Plaintiff, Earl Dubey & Sons, Inc.?